

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File:

Elizabeth

Date:

In re:

MAY 29 1996

IN EXCLUSION PROCEEDINGS

APPEAL

INDEX

ON BEHALF OF APPLICANT: Cindi L. Dresdner, Esquire  
Catholic Legal Immigration Network Inc.  
FDR Station P.O. Box 1390  
New York, New York 10150

ON BEHALF OF SERVICE: Edward Weiss  
Assistant District Counsel

EXCLUDABLE: Sec. 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C.  
§ 1182(a)(7)(B)(i)(II)] - No valid nonimmigrant  
visa or border crossing card

Sec. 212(a)(7)(B)(i)(I), I&N Act [8 U.S.C.  
§ 1182(a)(7)(B)(i)(I)] - Nonimmigrant without  
valid passport

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C.  
§ 1182(a)(7)(A)(i)(I)] - No valid immigrant  
visa passport

APPLICATIONS: Asylum; withholding of deportation

ORAL ARGUMENT: March 20, 1996

*Vacca, Rosenberg, Mathon*

In a decision dated March 14, 1995, an Immigration Judge found the applicant to be excludable as charged and denied her the aforementioned forms of relief. The applicant appealed and requested the opportunity to present oral argument to this Board. Oral argument was heard on March 20, 1996. The appeal of the applicant will be sustained and we will order that she be afforded asylum in the United States.

I. The Applicant's Claim

The applicant seeks asylum or the withholding of her deportation to Somalia, as provided for by sections 208(a) and 243(h) of the Act, respectively. 8 U.S.C. §§ 1158(a) and 1253(h). She seeks that relief on the basis of her claim that she suffered persecution in Somalia, and that she has a well-founded fear of persecution in that country, on the basis of her membership in a particular social group, to wit, the Marehan sub-clan.

The applicant provided the following account in support of her claim, as set forth in the brief that she has submitted on appeal:

Toward the end of 1990, a lot of resentment was brewing among Somalia's various clans against the Marehan sub-clan. . . . The violence against the Marehan began in Mogadishu in December of 1990. In that month, the United Somali Congress (USC) militia invaded Mogadishu. The USC (composed primarily of Hawiye clan members) started killing Darod people and looting their properties. The Marehan, however, as symbols of what they considered a repressive government, were targeted for special retaliation. By about the third week of January 1991, the home was surrounded by bullets. . . . family decided to leave Mogadishu to go to a camp called Ahmed Guray where Darod people were fleeing to arrange for escape from Somalia.

[T]he applicant's father, . . . refused to leave his home. [T]wo of . . . brothers, . . . decided to follow suit and also stayed behind. Meanwhile, Mr. Jama fled to Ahmed Guray with her mother and the rest of her siblings. The camp was still being protected by the Somali military which was loyal to the government of Siad Barre.

After several days at the military camp, Ms. Jama and her mother decided to go back to the house to check on her father and brothers. [A]ll their worst fears were realized when they discovered the dead bodies of the two boys and their father. [T]hey noticed that the father and brothers had been shot in the head, and concluded that they must have been killed by the Hawiye. . . .

Ms. Jama and her mother were forced to return to the camp where they had left the other children. While on their way to the camp, bullets began flying and one bullet fell right in front of them. As a result, mother and daughter were separated. After being separated from her mother, Ms. Jama was captured by six men in a car, who demanded she tell them what clan she belonged to. She responded "Darod" because she knew there was no way to hide it. Ms. Jama testified that the men surely would have known that she was Marehan, no matter what she would have said, because of her telltale accent. The men pushed her into the car, and one of them hit her with his gun butt in her stomach when she resisted. Another hit

her hand with a bayonet, which cut into her wrist causing bleeding. When she resisted more, another one hit her with his hand. She was bleeding when they took her by force into the car, and still retains a permanent scar on her right wrist from the force of the bayonet.

After forcing her into the car, the USC soldiers took her to an old military camp called "Halane" where thousands of prisoners were detained in the barracks. She was detained there for fifteen terrible days. While she was there, she was constantly beaten, dragged across the floor, had her earring pulled down from her ear, causing terrible pain and permanent scarring, and contracted malaria. Her wounded wrist was in constant terrible pain, and she was beaten on a daily basis. Finally, on the fifteenth day, a young man whose father had been a friend of her father's, recognized her. He and a friend of his helped her to escape from the camp in the middle of the night and took her to a city called Afgoi.

When Ms. [redacted] got to Afgoi, she met up with other Marehan who were running away from there. She fled with them all the way to Kismayu, where she finally found her mother and siblings. The remaining members of the [redacted] family stayed together in Kismayu from the rest of February 1991 until May of 1991. In May of 1991, the USC invaded Kismayu and again began to persecute all members of the Darod clan. Again, the Darod people were scattered and forced to flee. [redacted] family fled by boat to Mombasa, in Kenya. In Mombasa, they were taken to a place called "ShowGround", an old celebration area which was being used for refugees. The family stayed there for about two months, and then all the Somalis were taken to another camp called Atanga. Ms. [redacted] resided there with her family until she was able to secure passage to the United States.

The applicant provided a consistent account of the events that befell her in her application for relief, in her testimony before the Immigration Judge, and in support of her appeal.

## II. The Decision of the Immigration Judge

In reaching the decision in this case, the Immigration Judge appeared to give full credit to the account provided by the

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applicant. Nonetheless, an adverse decision was made. The following sets forth the crux of that decision:

I do not find that there was anything specific in the applicant's circumstances which would separate her from any other individuals in that situation. It should be noted that the applicant herself had indicated that the Darods were in power in the southern portions of Somalia. The Board has held that a generalized fear of violence from civil war is insufficient to establish persecution on account of any of the five grounds and that a countrywide violence does not amount to persecution. Matter of Sanchez & Escobar, 19 I&N Dec. 276 (BIA 1985). It should be noted that the applicant may go back to that part of Somalia where the Darods are in power. See Matter of R, Interim Decision 3195 (BIA 1992), and according to the precedent decision in Matter of R, the persecution or fear of persecution must be country-wide. As far as the 15 day detention by the USCs and the Hawaiyes, I do not find that it is persecution on any of the five enumerated grounds.

Because we find legal and factual error in the decision of the Immigration Judge, as will be discussed in greater detail in Parts V-VI of this decision, we have exercised our plenary power to review the record de novo. Matter of Lok, 18 I&N Dec. 101 (BIA 1981), aff'd on other grounds, 681 F.2d 107 (2d Cir. 1982). Likewise, in reviewing the discretionary determination of the Immigration Judge, this Board relies upon its own independent judgment in reviewing the ultimate disposition of the case. Matter of Burbano, 20 I&N Dec. 872 (BIA 1994).

### III. The Position of the Immigration and Naturalization Service

The Service makes the following points in response to the applicant's appeal: the applicant's testimony was not candid; any harm suffered by the applicant in Somalia resulted from general conditions of violence and civil strife, which is not persecution; the applicant did not establish that a threat of persecution exists for her country-wide; the applicant did not establish that she was the target of harm because of her membership in a clan; and, in view of the applicant's residence in Kenya for three years and three months, her circumvention of orderly refugee procedures, her payment of \$2,500 to an arranger to come to the United States, and her lack of candor, a favorable exercise of discretion is not warranted. Our disagreement with these positions will be developed in Parts V-VII of this decision.

IV. The Law on the Basis of which the Board Concludes that the Applicant has Established Past Persecution

An applicant's request for asylum will be granted if he or she can prove eligibility for asylum and there are no significant reasons for denying asylum. See 8 U.S.C. § 1158(a); 8 C.F.R. §§ 208.13, and 208.14.

An applicant is eligible for asylum if he or she can meet the burden of showing that he or she is a refugee within the meaning of section 101(a)(42)(A) of the Act:

The term "refugee" means (A) any person who is outside any country of such person's nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

8 U.S.C. § 1101(a)(42)(A) (1988); see also Elias-Zacarias, 502 U.S. 478 (1992).

We construe "persecution" to mean either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), overruled on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Maccaud, 14 I&N Dec. 429, 434 (BIA 1973); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973); Matter of Diaz, 10 I&N Dec. 199, 200 n.1 (BIA 1963); see also Matter of Laipenieks, 18 I&N Dec. 433, 456-57 (BIA 1983). The harm or suffering inflicted could consist of confinement or torture. See Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir. 1961). It also could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom. See, e.g., Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1961); Matter of Salama, 11 I&N Dec. 536 (BIA 1966); Matter of Eusaph, 10 I&N Dec. 453, 454 (BIA 1964).

With respect to claims made by individuals based upon persecution suffered or a well-founded fear of persecution on account of membership in a particular social group in Somalia, for example, membership in a clan, it is incumbent upon the applicant to establish his or her membership in the clan and that he or she has been persecuted, or may be persecuted, on account of that membership. Matter of Acosta, *supra*; see also INS Memorandum dated December 9, 1993, entitled "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group

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under the INA," cited in Immigration and Naturalization Service Immigration Law and Procedure Basic Law Manual, Special Supplement 1995 at 48. According to the aforementioned memorandum, "[a] Somali clan appears to meet the criteria of a particular social group." We have also so held. Matter of Hussein, Interim Decision , (BIA 1996). Particularly, in that case we held that the Marehan sub-clan can be characterized as a "particular social group" for purposes of a request for asylum.

The testimony of the applicant, if credible in light of general conditions in his or her country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 208.13(a) ; see also Matter of Dass, Interim Decision 3122 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). And, once an applicant has established that he or she is a refugee, eligibility for asylum may, in select circumstances, be established solely on the basis of past persecution. See Matter of Chen, Interim Decision 3104 (BIA 1989); 8 C.F.R. § 208.13(b)(1)(i).

#### V. The Law as it Relates to the Facts of this Case

As the Immigration Judge appeared to do, we accept the account provided by the applicant of the events that caused her to flee Somalia and ultimately seek refuge in the United States. We do so in light of the detailed and consistent account provide by the applicant throughout the course of these proceedings. The Service questions the candor of the applicant for reasons relating to her travel to the United States rather than the substance of her claim. We are not persuaded to discredit the detailed and consistent testimony of the applicant on that basis. To the contrary, we are persuaded to accept the veracity of the claim made by the applicant insofar as it comports to information of record regarding country condition in Somalia. See Country Reports on Human Rights Practices for 1991, Committee on Foreign Affairs House of Representatives and Committee on Foreign Relations U.S. Senate, 102d Congress, 2d Session (February 1992), at p. 344-351; Country Reports on Human Rights Practices for 1992, Committee on Foreign Relations U.S. Senate and Committee on Foreign Affairs U.S. House of Representatives, 103d Congress, 1st Session (February 1993), at pp. 235-239; Country Reports on Human Rights Practices for 1993, Committee on Foreign Affairs U.S. House of Representatives and Committee on Foreign Relations U.S. Senate, 103d Congress, 2d Session (February 1994), at pp. 258-263; Country Reports on Human Rights Practices for 1994, Committee on Foreign Relations U.S. Senate and Committee on Foreign Affairs U.S. House of Representatives, 104th Congress, 1st Session (February 1995), at pp. 227-232 (hereinafter "1994 Country Report").

Having accepted the account provided by the applicant as true, it is to be determined whether that account establishes that she suffered persecution or that she has a well-founded fear of persecution in Somalia. Then, if past persecution or a well-founded fear of future persecution is established, it is to be determined whether the persecution was or would be on account of the applicant's membership in a particular social group.

The applicant's claim reflects that she was pushed, hit, cut, dragged, repeatedly beaten, and "detained" for a period of 15 days. We find this confinement and infliction of suffering to constitute persecution. Matter of Acosta, supra.

Having found that the treatment suffered by the applicant was persecution, we must determine whether the applicant suffered that persecution on account of her membership in a particular social group. Both the Immigration Judge and the Service attribute the adverse circumstances that befell the applicant to the civil conflict in Somalia and for that reason discount the possibility that she suffered persecution on account of a ground protected by the Act. Such a conclusion is in error.

As the Service recognized in its memorandum entitled "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA," supra at 4-5, "[t]he Somali applicant has the burden of demonstrating that his or her clan is the target of harm not deriving from general civil strife, but inflicted on the clan members precisely because of their clan membership." See also Matter of Acosta, supra (harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome; injury arising out of civil strife or anarchy does not constitute persecution). An examination of the applicant's claim leads to the obvious conclusion that the applicant was persecuted based upon her membership in a particular social group, to wit, the Marehan clan.

The applicant and her mother, upon returning from the family home where they found three members of the family dead from gun shot wounds to the head, confronted random gunfire. In seeking to escape that gunfire, the applicant and her mother were separated. Clearly, this unfortunate result of the general conditions of war in Somalia is not sufficient to provide a basis for an application for asylum in the United States. Although the gunfire could have resulted in severe harm to the applicant, and did in fact result in her separation from her mother, there is nothing in the record that would indicate that the gunfire was aimed at her or that it was aimed at her on account of a ground protected by the Act.

Quite to the contrary, the persecution suffered by the applicant, previously detailed, was clearly on account of her membership in a particular social group. The applicant's persecutors, members of an enemy clan, stopped her, inquired as to her clan affiliation, and only upon her response, identification with a particular clan, did they initiate their persecution of her. We conclude, therefore, that the applicant, having suffered past persecution based upon her membership in a particular social group, is presumed to have a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(1)(i)

#### VI. The Presumption of a Well-founded Fear of Future Persecution

As a matter of regulation, because the applicant demonstrated that she suffered past persecution, there is a presumption that she has a well-founded fear of persecution in Somalia, and that her life or freedom would be threatened upon her return there, unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in Somalia have changed to such an extent that she no longer has a well-founded fear of being persecuted if she were to return to that country. 8 C.F.R. §§ 208.13(b)(1)(i) and 208.16(b)(2).

According to the aforementioned regulations, it is the burden of the Service to establish a change in country conditions where an applicant bases an application for asylum on past persecution. 1/ The Service has presented no evidence to show that country conditions in Somalia have changed to such an extent that the applicant would no longer face persecution in that country. Accordingly, we are compelled to find that the applicant has a well-founded fear of persecution in Somalia.

#### VII. The Exercise of Discretion

In light of our finding that the applicant suffered persecution in Somalia and that she has a well-founded fear of persecution there, the applicant has established her eligibility to be

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1/ Both the Immigration Judge and the Service opined that the applicant could safely return to an area of Somalia which they characterize, based on the applicant's testimony, as being under the control of the Darood clan of which the Marehan are a sub-clan. This opinion is based on a slanting of the applicant's testimony. The applicant testified that the Darood clan were strong in the southern portion of Somalia, but that is no longer so. She further testified that the Darood offered no protection to the Marehan when they were being eliminated by an opposing clan because they too were opposed to the Marehan controlled government.



accorded asylum in the United States. Once eligibility for asylum has been established, the decision to grant asylum is a matter committed to the discretion of the Attorney General. 8 U.S.C. § 1158(a); Matter of Pula, 19 I&N Dec. 467 (BIA 1987). In order to determine whether the applicant warrants a favorable exercise of discretion, we must weigh the adverse factors of record against the unusually harsh circumstances that she would face if she is deported to Somalia. Id.

It is the position of the Service and the Immigration Judge that because the applicant spent over 3 years in Kenya after fleeing Somalia, and because she circumvented orderly refugee procedures, paying \$2,500 to an arranger to come to the United States, a favorable exercise of discretion is not warranted. The Service, as we have previously noted, also found the applicant to be lacking in candor, a point with which this Board disagrees.

There is no dispute that the applicant lived in a refugee camp in Kenya for approximately 3 years before coming to the United States. She described the conditions there as being very difficult. Although the inhabitants of the camp were fed, they could not leave the camp, let alone seek asylum in Kenya or residence outside of the camp. They were not availed of identification or travel documentation. And, the applicant lived in constant fear of being forced to return to Somalia.

The applicant's description of the plight of Somali refugees in Kenya comports with information in this regard compiled by the United States Department of State. According to the 1994 Country Reports refugees are not granted legal permanent resident status. There has been official pressure from the government of Kenya on the United Nations High Commissioner for Refugees (UNHCR) to close at least one refugee camp and UNHCR has accepted in principle the government's right to close the camp. Additionally, there have been credible reports of rape of Somali women in the camps and outside of the camps, and there have been allegations of government security involvement and of the government's not taking the issue seriously. Refugees living outside of the camps are vulnerable to arrest. 1994 Country Reports at p. 122.

In consideration of whether to afford the applicant asylum in the United States in the exercise of discretion, we will not consider her prolonged stay in a refugee camp as a factor adverse to her request for asylum. If this Board was to accept the premise advanced by the Immigration Judge and the Service in these proceedings, that because the applicant was ensconced in a fenced refugee camp she is less deserving of asylum as a matter of discretion, we would undermine the United States' commitment to nonrefoulement which is embodied in this government's ratification of the 1967 United Nations Protocol Relating to the Status of

Refugees. See Protocol relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (hereinafter 1967 U.N. Protocol). The 1951 Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, which was incorporated into the 1967 U.N. Protocol,

accords to refugees an absolute right to make a claim to nonrefoulement protection. Refugees who are denied adjudication of their claim to protection against refoulement in the third country do not have security from deportation despite their valid claim to refugee status, and therefore cannot in any meaningful manner go about the business of rebuilding their lives. Indeed, refugees who are denied the opportunity to assert their claim to refoulement protection have not found a meaningful safe haven as they are not protected from the possibility of being returned to the country from which they fear persecution. (footnote omitted)

Miller, Demystifying "Safe Haven": The Case of Salvadoran and Guatemalan Refugees who have Lived in Mexico, 3 Georgetown Immigration Law Journal 45, 56 (1989). Our concern that the applicant could face forced repatriation is underscored by the pressure that the government of Kenya has brought to bear on UNHCR with regard to the closing of camps and the UNHCR's acknowledgement that to do so is within the prerogative of the government.

Nor will we consider the applicant's circumvention of orderly refugee procedures to warrant that she be denied asylum in the exercise of discretion. In Matter of Pula, supra, we recognized that while circumvention is an adverse factor, it is only one of a number of factors that should be balanced in exercising discretion. In these proceedings, we will accord it little weight. The State Department has repeatedly acknowledged that the collapse of the Somali Government has left the Somali people without travel documents needed for international travel. Country Reports on Human Rights Practices for 1994, Committee on Foreign Relations U.S. Senate and the Committee on International Relations U.S. House of Representatives, 104th Congress, 1st Session (February 1995), at p. 230; Country Reports on Human Rights Practices for 1993, Committee on Foreign Affairs U.S. House of Representatives and Committee on Foreign Relations U.S. Senate, 103d Congress, 2d Session (February 1994), at p. 262. The applicant testified that such documentation was not made available to Somali refugees by Kenyan authorities and she also noted that it was only once travel arrangements had been made for her that she was allowed to leave the refugee camp to board a flight to the United States. In light of these circumstances, we do not find the applicant's circumvention of orderly refugee procedures to warrant the denial to her of asylum in this country.

We note that the applicant has a sister in the United States who was afforded refugee status in this country and with whom the applicant can live. The applicant also has a United States citizen uncle and cousin. The rest of her family, two younger siblings, remain in a refugee camp in Somalia.

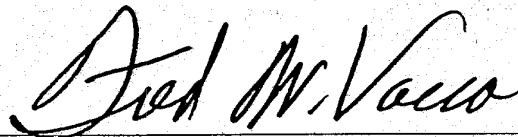
Considering all factors, including the harm the applicant would suffer if the United States were to return her to Somalia, we will favorably exercise discretion in this case in order to grant her request for asylum.

VIII. The Applicant's Request for Withholding of Deportation

Because the applicant's asylum application will be approved, we need not address her application for withholding of deportation pursuant to section 243(h) of the Act, 8 U.S.C. § 1153(h). Matter of Mohgarrabi, supra, at 12. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The application for asylum is granted, and the exclusion proceedings now pending against the applicant are hereby terminated.



FOR THE BOARD

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

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File: Elizabeth

Date: MAY 2 1996

In re:

CONCURRING AND DISSENTING OPINION: Lauren R. Mathon, Board Member

I respectfully concur in part and dissent in part.

I am in agreement with the majority that the applicant has established that she is statutorily eligible for the relief of asylum as provided for by section 208(a) of the Act, 8 U.S.C. § 1158(a). However, I would not afford her that relief in the exercise of discretion.

As the decision of the majority makes clear, once the applicant fled her native Somalia, where she was persecuted on account of her membership in a particular social group, she remained in a refugee camp in Kenya for a period of 3 years and 3 months. When she departed to the United States, her mother and younger siblings remained in the camp.

While the applicant asserted that while she was in the refugee camp she feared that she would be forcibly returned to Somalia, there is no information of record reflecting that the applicant's siblings who remained in the camp suffered such a fate. <sup>1/</sup> Therefore, it is clear to me that the applicant had a safe haven in Kenya which is not obviated by her unfounded fear of forced return to Somalia. See Matter of Gharadaghi, 19 I&N Dec. 311, 315 (BIA 1985). If it were the case that the applicant had in fact faced imminent deportation back to Somalia, I would not have determined that Kenya provided a safe haven. See Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987). But, such was not case. Accordingly, on the basis of the applicant's safe haven in Kenya, and having also considered adversely that the applicant paid \$2,500 to an arranger for assistance in circumventing orderly refugee procedures, I would deny her the relief of asylum in the exercise of discretion. Id.

Nonetheless, the applicant is eligible to have her deportation to Somalia withheld. An alien who seeks withholding of deportation from any country must show that his or her "life or freedom would be threatened in such a country on account of race,

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<sup>1/</sup> This Board was informed at Oral Argument that the applicant's mother is deceased.

religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act, 8 U.S.C. § 1253(h). In order to make such a showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds. INS v. Stevic, 467 U.S. 407 (1984). This "clear probability" standard requires a showing that it is more likely than not that an alien would be subject to persecution. Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990). Once an alien establishes that he or she qualifies for withholding of deportation, it must be granted and he or she cannot be returned to the country where he or she would face persecution. Id.

As discussed in Part VI of the majority opinion, insofar as the Service has presented no evidence to show that country conditions in Somalia have changed to such an extent that the applicant would no longer face persecution in that country on account of her membership in a particular social group, I am compelled to find, as a matter of regulation, that there is a clear probability that the applicant would suffer persecution in Somalia on that basis. 8 C.F.R. § 208.16(b)(2). Accordingly, her deportation to that country must be withheld.

Lauren R. Mathon  
Lauren R. Mathon  
Board Member